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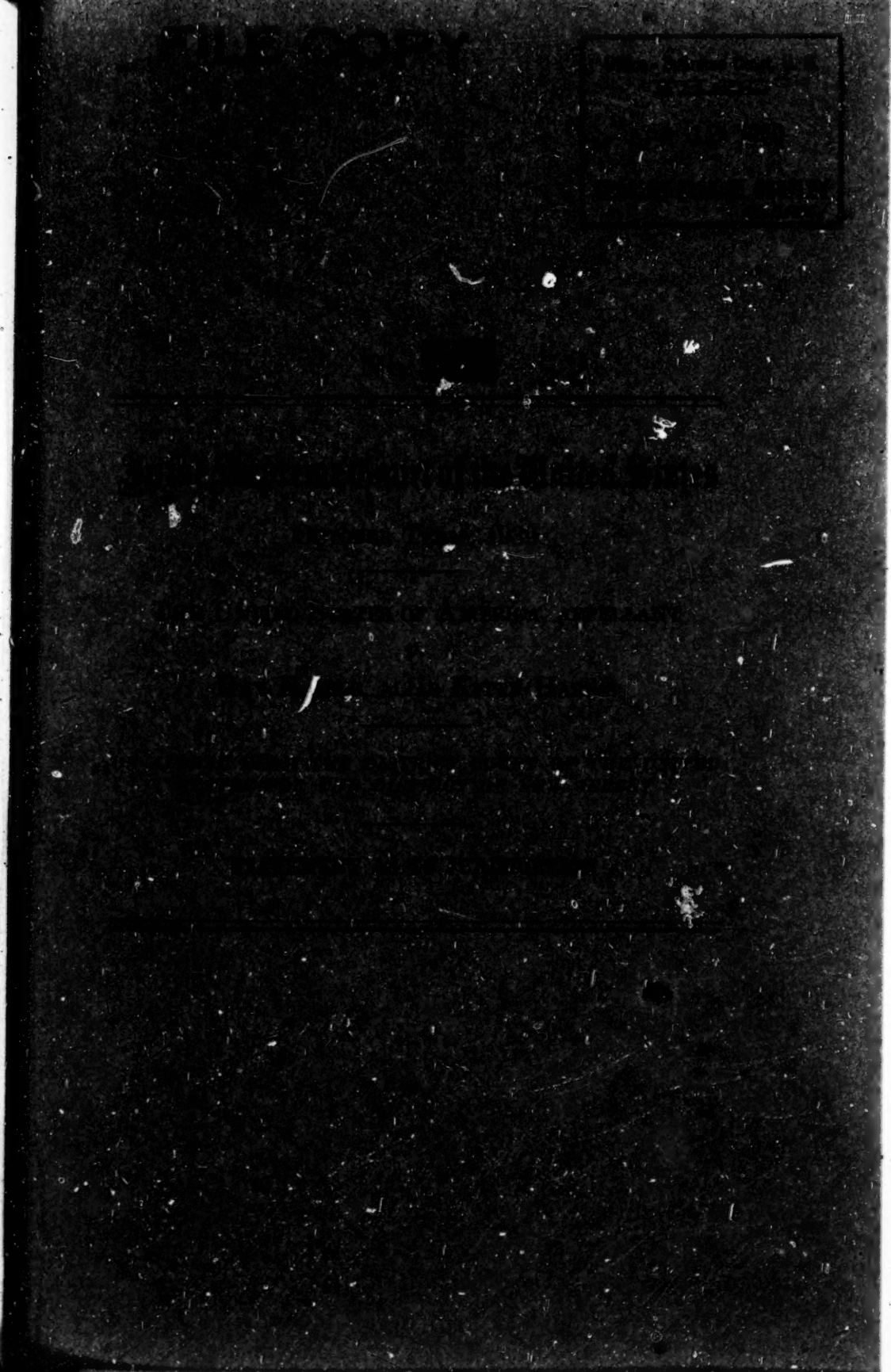

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In the United States District Court for the District of New Jersey

No. 8911b

UNITED STATES OF AMERICA

v.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

STATEMENT OF JURISDICTION

(Filed March 20, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682 of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein, is the Perjury Statute (Criminal Code, Section 125; U. S. C., Title 18, Section 231). This statute provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any

case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

C. The judgment of the District Court sought to be reviewed was entered on March 18, 1940, and the petition for appeal was filed on March 20, 1940, and is presented to the District Court herewith, to wit, on the 20th day of March 1940.

The indictment in this case contains a single count and is based upon the Perjury Statute, quoted *supra*. It charged that the defendant, having first taken an oath before a grand jury, swore falsely that she had not made certain statements to Government agents, the fact of such statements having been made being material to the inquiry conducted by the grand jury. Among the statements which the indictment alleged that the defendant made to the Government agents and which before the grand jury she denied making were that she had gone to one Ray Born in 1932 and talked to him about opening a house of prostitution; that she had spoken to one Lou Kissel at certain places in Atlantic City, New Jersey; and that she had

paid money to one James McCullough and had spoken to Born "after her place was closed at 29 North Michigan Avenue."

The defendant filed a motion to quash the indictment upon the ground that it did not charge an offense against the United States. This motion was sustained by the District Court in an order which stated that "the indictment does not charge an offense under the statute" [perjury statute].

The court conceded that the indictment sufficiently alleged that the grand jury was regularly convened, that the defendant was duly sworn as a witness, and that the questions asked of the defendant were material to the issue being investigated by the grand jury. It is also apparent that the indictment charged that the defendant's testimony before the grand jury that she had not made certain statements to the Government agents was knowingly false. The court nevertheless held that the indictment did not allege an offense under the Perjury Statute since it did not charge that her testimony before the grand jury was untrue in fact; *i. e.*, as we understand it, that it did not charge that her testimony before the grand jury that she had not talked to Ray Born in 1932 about opening a house of prostitution, etc., was untrue. In other words, the District Court construed the Perjury Statute as excluding from its purview those cases where a person under oath falsely denies having made a prior statement.

In support of its decision the court cites *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4th), *Phair* v. *United States*, 60 F. (2d) 963 (C. C. A. 3d), and *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.). These cases are clearly not in point. Not only did they involve merely questions of proof, but in none of them was the charge of perjury based, as in the instant case, upon the false denial of the fact that certain statements had theretofore been made.

The distinction between perjury of the type involved in the cases upon which the court below relies and that charged in the instant case is well illustrated in the case of *O'Brien* v. *United States*, 99 F. (2d) 368 (App. D. C.).[1] In that case O'Brien, who had been assaulted and shot, made a written statement to police officers naming certain persons as his assailants. At the trial of these persons O'Brien testified that he did not remember making certain material parts of the statement and denied that he had made certain other material parts thereof. Because of the alleged falsity of this testimony he was indicted for perjury and convicted. On appeal he contended that the trial court improperly refused to permit him to introduce evidence that his statement to the police officers was procured from him by promises and

[1] In this case a motion for leave to proceed *in forma pauperis* was denied because the application for writ of certiorari was not timely filed (305 U. S. 562).

threats. In upholding the action of the trial court, the Court of Appeals said (pp. 368–369):

> * * * Ordinarily it is proper procedure, in a criminal case where an incriminating statement of the accused is claimed to have been obtained by duress, for the judge to hear the evidence and determine its admissibility out of the presence of the jury. But that rule has no application here, for the question was not the incriminating nature of the statement but whether, as charged in the indictment, the statement had in fact been made. If appellant had been indicted for the violation of the liquor laws which his statement revealed, proof that duress and coercion induced the statement would have rendered it inadmissible. But that is not this case. Or if the charge of the indictment had been that appellant, having first stated on oath that a certain fact was true, had later stated on oath that it was not true, and if appellant had defended on the ground that his first statement was made under duress, the admissibility of that statement might be questionable. *State* v. *Thornton*, 245 Mo. 436, 150 S. W. 1048. But that also is not this case. Instead, appellant was indicted for testifying under oath that a fact which indisputably occurred, did not occur. In that view the question is not whether appellant made the statement voluntarily or involuntarily or whether the statement made was true or false, for it was not the truth or falsity of what he said which

> was involved, but simply the fact of his having said it. The government's case in this aspect was directed to proof of that fact alone. We think the statement was properly admitted.

See also *Behrle* v. *United States*, 100 F. (2d) 714 (App. D. C.)

D. From what we have said it is apparent that the question presented is a substantial and important one. If the decision of the District Court is permitted to stand, it would follow that, where one had made statements before a grand jury in reliance upon which an indictment was returned against another, he could at the trial of such indictment with impunity deny having made such statements and thus often frustrate the prosecution and conviction of the defendant under indictment. Furthermore, if persons who make statements to Government agents investigating alleged federal offenses can, without fear of punishment, subsequently falsely deny under oath that they have given such statements, it is evident that the value of such statements as a link in the process of federal law enforcement will be seriously impaired.

E. The following decisions are believed to sustain the jurisdiction of the Supreme Court under that provision of the Criminal Appeals Act allowing a direct appeal to the Supreme Court "From a decision or judgment quashing * * * any indictment * * * where such decision or judg-

ment is based upon the * * * construction of the statute upon which the indictment is founded":

United States v. *Patten,* 226 U. S. 525, 535;

United States v. *Birdsall,* 233 U. S. 223, 230;

United States v. *Kapp,* 302 U. S. 214, 217;

United States v *Borden Co.,* No. 397, present Term, decided December 4, 1939.

Appended hereto is a copy of the opinion of the court rendered on February 15, 1940.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
JOHN J. QUINN,
United States Attorney.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[Endorsed:] Filed March 20, 1940, at 1:30 o'clock p. m.

BENJAMIN F. HAVENS,
Clerk.

In the United States District Court for the District of New Jersey

ON INDICTMENT 8911b

UNITED STATES OF AMERICA

v.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

ON MOTION OF DEFENDANT TO QUASH

George R. Sommer, for the motion.

John J. Quinn (United States Attorney), by *Joseph W. Burns* (Special Assistant United States Attorney), opposed.

MEMORANDUM

AVIS, *District Judge:*

Defendant, through her attorney, moves to quash the indictment returned in this case, upon the ground that it does not charge an offense against the United States.

The indictment charges the defendant with having committed perjury in violation of the statute, 18 U. S. C. A. sec. 231.

The specific charge is that defendant, on October 17, 1939, was called as a witness before the United States Grand Jury for the District of New Jersey,

at Newark, duly sworn, and gave certain testimony, and was particularly interrogated as to statements made to F. B. I. agents in 1937. The defendant denied categorically that these alleged statements were made by her.

The allegation of the indictment is that—

> May Harris, alias Kitty Harris, at the said City of Newark, in the County, State, and District aforesaid, at the times she made the statements aforesaid, then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents, A. Dickstein, E. R. Davis, and J. L. Brennan that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution at 219 North North Carolina Avenue; that she had spoken to Lou Kissel at the Ritz Carlton Hotel and at 110 South Iowa Avenue in Atlantic City, New Jersey; that she had paid money to said James McCullough and had spoken to Ray Born after her place was closed at 29 North Michigan Avenue.

The Government, by its Attorney, admits and states that its case is based entirely upon the fact that defendant, as a witness before the Grand Jury, denied that she made certain statements to the agents, whereas in fact she did make such statements. In other words, the Government insists

that the indictment should be upheld, although no direct proof of the falsity or truth of the testimony given before the Grand Jury is available, except the testimony of agents who will testify that, at a prior meeting, the defendant told them as facts, the statements contained in the questions submitted to defendant before the Grand Jury.

Counsel for defendant claims that under such an allegation the indictment cannot be sustained; that to allege or prove perjury it must be shown that the substance of the statements of defendant were untrue in fact, and that defendant cannot be convicted of perjury because her sworn testimony was in conflict with an alleged statement made by her on a former date.

Undoubtedly at the time the testimony was given the Grand Jury was regularly convened and the witness duly sworn, or so it is alleged in the indictment.

I am satisfied that, under the terms of the indictment, the questions asked of defendant were material to the issue there being investigated.

Perjury is a serious offense, and a person who commits perjury is entitled to severe condemnation. The courts and other bodies depending upon facts for adjustment of controversies, or obtaining facts by investigation, are powerless to render proper determinations unless persons in testifying tell the truth to the best of their knowledge. However, by reason of the seriousness of the charge and

its peculiar attributes, it is required that perjury be proven by the testimony of two credible witnesses, or one credible witness with corroboration, or circumstances sustained by clear and convincing proof.

While there are some cases which appear to be to the contrary, I am satisfied that the allegations in an indictment necessary to show the commission of the offense must charge that the testimony given was untrue in fact, and that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses.

In the case of *Clayton* v. *United States,* 4 Circ. 284 F. 537, the court said on page 540:

> In the case at bar no attempt was made to prove by "positive and direct evidence" that defendant made false answers to the first two questions set out in the indictment, namely, whether he had procured any intoxicating liquor from any person during the period named, and whether he had had any intoxicating liquor in his possession during that period. Indeed, the only evidence in support of these assignments is the testimony of two witnesses as to what defendant had told them in private conversation some time before the grand jury met. This was quite insufficient, for the falsity of

> a sworn statement is not shown by proof of an unsworn contradictory statement. In view of the strong presumption of innocence, and because of the solemnity of an oath, credit must be given to what defendant said under oath, rather than to what he may have said to the contrary when not under oath. *Billingsley* v. *State*, 49 Tex. Cr. R. 620, 95 S. W. 520, 13 Ann. Cas. 730, 21 R. C. L. 272; 30 Cyc. 1455; Whatrton's Crim. Ev. sec. 387.

In *Phair* v. *United States*, 60 F. 2d 953, the Circuit Court of Appeals for the Third Circuit, in a case appealed from a judgment rendered in the District Court of the United States for the District of New Jersey, established the same principle.

In that case Phair was alleged to have subscribed and sworn to an affidavit with relation to the ownership of a certain saloon wherein intoxicating liquor was kept and sold. In the affidavit he denied ownership. It was charged that later in another proceeding Phair admitted ownership. There was some question as to whether the admission referred to the exact property referred to in the affidavit, but, however that may be, the court stated the law applicable to the instant motion as follows on page 954:

> But assuming that Mr. Cohen, and not the other witnesses, correctly stated what Phair said, it simply amounts to an affidavit on the one side and contrary oral statements by the same person on the other. The affidavit and

the later statements cannot both be true, and which one is true is unknown, for there are no corroborating circumstances sufficient to establish the truth of the statements contradicting the affidavit.

* * * * *

At most, there was an oath on the one side, and conflicting testimony as to what Phair later said contrary thereto, on the other, without sufficient attending circumstances. If all three witnesses had unequivocally testified that Phair later flatly denied the truth of the statements made in his affidavit, the result would have been an affidavit by Phair and a subsequent denial of it by him. All that the testimony of the three witnesses amounts to is the establishment of a denial by Phair of his affidavit, and the mere denial of the truth of the affidavit is not sufficient to sustain the charge of perjury.

The case of *United States* v. *Golan*, D. C., 24 F. Supp. 523, decided by Judge Maris, then Circuit Judge, but determining a motion for a new trial in a case in which he had sat as a District Judge, held as follows on pages 523–4:

Turning to a consideration of the common law of Pennsylvania I find it to be settled that two or more contradictory statements of a defendant standing alone will not sustain a charge of perjury. *Com.* v. *Bradley*, 109 Pa. Super. 294, 167 A. 471. Before a defendant may be convicted upon his admission that a prior statement under oath was

false, it is necessary to establish the corpus delicti, that is, the falsity of the defendant's prior sworn statement. *Com.* v. *Haines,* 130 Pa. Super. 196, 196 A, 621.

In the present case the Government offered evidence proving that the defendant gave the testimony and made the affidavit in his naturalization proceeding which it contended were false. It then offered in evidence certain admissions by the defendant that this testimony and affidavit were false. No other evidence as to their falsity was produced, however, and I submitted the case to the jury upon the contradictory statements of the defendant alone and over his objection that the corpus delicti had not been proved. I am satisfied that this was error and that I should have sustained the defendant's motion for a directed verdict of not guilty.

These cases are convincing as to the rule established in this Circuit, and it is my duty to follow the rule so established.

The Government relies mainly upon two cases: The first, *O'Brien* v. *United States,* C. A. D. C., 99 F. 2d 368. While it is true in that case the court sustained a conviction based upon the making of contradictory statements, the question as to whether that constituted perjury was not raised or decided. The first question decided was whether the statement, made by defendant, which constituted the proof of perjury had been procured by promises and threats. The second, an alleged com-

mission of error by the trial court in permitting the stenographer who recorded the original statement to read to the jury those parts of it which proved the defendant's commission of other criminal offenses, and the third related to the imposition of sentence, as to whether defendant should have been sentenced under the District of Columbia Code or the Federal Penal Code. It is not a precedent for the contention. Petition for writ of certiorari to the Supreme Court was filed, including a motion to proceed in forma pauperis, which motion was denied (see 305 U. S. 502). Apparently no further proceedings were taken in the Supreme Court.

The second case is *Behrle* v. *United States,* C. A. D. C. 100 F. 2d 714. That case seems to be exactly in point, following the doctrine established in the case of *People* v. *Doody,* 172 N. Y. 165, 64 N. E. 807.

In both of these cases the courts apparently relied upon the principle that perjury can be proved by so-called circumstantial evidence. I cannot believe that the courts can make new law on this subject, when for so many years it has been held otherwise.

The motion to quash will be granted.

U. S. GOVERNMENT PRINTING OFFICE: 1940